

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TONY TYRONE BLACK,

Defendant.

Case No. CR97-5017FDB

ORDER DENYING MOTION FOR
RECALL OF MANDATE AND
MOTION TO APPOINT COUNSEL

Defendant moves to “recall the mandate” in this matter and for appointment of counsel. Defendant asserts that his sentence is illegal, and he refers to 18 U.S.C. § 924(e) as well as the Court’s statements that indicate to Defendant that the Court would have sentenced him differently had there been leeway to do so.

There is a long history of motions in this case, which the Government has set out in detail in its brief. On December 13, 1999, Defendant first filed a 2255 motion, which was denied by this Court and on appeal, he filed another 2255 on February 9, 2004, which was referred to the Ninth Circuit and denied. Defendant filed another 2255 on August 12, 2004 (styled differently) and another on February 18, 2005, both of which were denied. The present motion is filed in the criminal case and styled as “Recall of Mandate Pursuant to Bockting v. Bayer and Shepard v. United States, 544 U.S. ____ 2005.”

1 The Government responds to this motion arguing that because the “mandate” is an order
2 from the Appellate Court directing a lower court to take a specific action, only the Ninth Circuit may
3 recall its own mandate and this Court has no jurisdiction.


4 Assessing that what Defendant actually seeks is a review and modification of his sentence, the
5 Government argues that a district Court may do so only pursuant to statutory authorization in three
6 limited circumstances that do not apply here: a motion from the Director of the Bureau of Prisons
7 (inmate 70 years of age, having served 30 years, etc.), sentencing range under which a defendant was
8 sentenced has been lowered by the Sentencing Commission; or Government motion based on
9 substantial assistance in the investigation or prosecution of another.

10 There is no doubt, as the Government states, that this motion is a fifth 2255 motion. The
11 Defendant must, therefore, apply for and obtain certification from the Ninth Circuit before the
12 motion can be considered.

13 Defendant also moves for appointment of counsel. Because this Court concludes that
14 Defendant is not entitled to seek relief in this Court and because the issue presented would not
15 require an evidentiary hearing in any event, Defendant’s motion for appointment of counsel will be
16 denied.

17 ACCORDINGLY, IT IS ORDERED: Defendant’s Motion for Recall of Mandate [Dkt. #
18 139] is DENIED and Defendant’s Motion to Appoint Counsel [Dkt. # 138] is DENIED.

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20 DATED this 10th day of October, 2006.

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23 FRANKLIN D. BURGESS
24 UNITED STATES DISTRICT JUDGE
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